Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

ACHILLES CORPORATION,

Petitioner,

v.

KAEPA, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May a federal court enjoin a foreign defendant from prosecuting a parallel in personam proceeding in the courts of that defendant's domicile, merely because the foreign action might result in unnecessary delay, inconvenience, expense, inconsistent rulings, or a race to judgment, as held by the court below and by a minority of the circuits, or, under principles of international comity, and as held by a majority of the circuits, should such an injunction issue only when the foreign proceeding threatens the jurisdiction of the federal court or is an attempt to evade important public policies of the forum?

RULE 29.6 LISTING

Petitioner Achilles Corporation has no parent companies and no nonwholly owned United States subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Achilles Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a - 25a) is reported at 76 F.3d 624. The orders of the district court (App., *infra*, 26a - 41a) are unreported.

JURISDICTION

The court of appeals entered its judgment on February 14, 1996. App., *infra*, 1a. The court of appeals denied the petition for panel rehearing and the suggestion for rehearing en banc on March 18, 1996. App., *infra*, 42a-43a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case arises out of a dispute between Respondent Kaepa, Inc., a United States athletic shoe manufacturer, and Petitioner Achilles Corporation, a Japanese corporation, over the parties' respective obligations under a distributorship agreement whereby Achilles became the exclusive distributor of Kaepa athletic shoes in Japan. The

distributorship agreement, which was executed in Japan, provided that Texas law and the English language would govern its interpretation, that Achilles consented to jurisdiction in Texas, and that the agreement "shall be enforceable in San Antonio, Texas."[1]

In July 1994, Kaepa filed suit against Achilles in Texas state court alleging breach of the distributorship agreement, as well as fraud and negligent misrepresentation. Achilles removed the case to the United States District Court for the Western District of Texas at San Antonio pursuant to 28 U.S.C. § 1332 and 28 U.S.C. § 1441(a). In that court, Achilles defended itself and cooperated in discovery propounded by Kaepa, but did not assert affirmative claims for relief.[2] In October 1994[3], less

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[1] The applicable language of the distributorship agreement reads:

> This Agreement shall be governed by the laws of the State of Texas, U.S.A., and shall be enforceable in San Antonio, Texas. The English version of this Agreement and the English language shall govern the interpretation and meaning of all words and phrases used herein. Distributor [Achilles] consents to jurisdiction in the State of Texas, U.S.A.

App., *infra*, 3a. The district court held that this clause permitted, but did not require jurisdiction in Texas. App., *infra*, 27a-29a.

[2] Achilles filed a motion to dismiss on the ground of forum non conveniens, which was denied by the district court. Achilles did not assert a counterclaim until it was ordered to do so by the district court.

[3] The opinion below says the Japanese suit was not filed until February, 1995. App., *infra*, 3a. As demonstrated by the Record, although Kaepa was not served until February 27, 1995, the Japanese petition was filed October 21, 1994, and the summons was issued December 9, 1994. R. 564-612.

than four months after Kaepa filed suit in Texas, Achilles filed suit in Japan alleging that Kaepa committed fraud in Japan and breached the distributorship agreement. Thereafter, in March of 1995, Kaepa filed a motion to enjoin Achilles from prosecuting its Japanese lawsuit.

Without notice or hearing, the district court granted Kaepa's motion to enjoin, ordering Achilles to refrain from prosecuting the Japanese lawsuit and to file its counterclaim in the federal action. Relying on *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852 (9th Cir. 1981), *cert. denied sub nom. Northwest Sports Enter., Ltd. v. Seattle Totems Hockey Club, Inc.*, 457 U.S. 1105 (1982), *In re Unterweser Reederei, Gmbh.*, 428 F.2d 888 (5th Cir. 1970), *aff'd on reh'g en banc*, 446 F.2d 907 (1971), *vacated on other grounds sub nom. M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and recent Seventh Circuit decisions, the district court found that separate adjudications might result in "unnecessary expense and inconvenience" or "inconsistent rulings or a race to judgment," App., *infra*, 37a, and concluded these were adequate grounds for granting an antisuit injunction.[4] The district court acknowledged, however, that some circuits, for reasons of comity, have adopted a stricter standard, allowing injunctions only when "(1) the foreign action threatens the jurisdiction of the enjoining forum or (2) strong public policies of the enjoining forum are threatened by the

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[4] The district court also held that the Japanese action was a compulsory counterclaim under Rule 13 of the Federal Rules of Civil Procedure. App., *infra.*, 36a-37a. The court of appeals noted that Rule 13 was consistent with its ruling, but specifically did not decide whether Rule 13 applies to foreign actions. App., *infra*, 8a n.14.

foreign action." App., *infra*, 35a-36a (citing *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349 (6th Cir. 1992); *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d Cir. 1987); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984)).

A panel of the Fifth Circuit affirmed the district court's order of injunction, with Judge Emilio M. Garza filing a lengthy and vigorous dissent. Both the majority and dissent recognized that federal courts have the power to enjoin persons subject to their jurisdiction from prosecuting foreign actions and that circuits differ on the proper legal standard to employ when determining whether to exercise that injunctive power. App., *infra*, 4a-5a, 12a. The majority, however, held it was bound by stare decisis to follow two prior Fifth Circuit decisions, *In re Unterweser Reederei, Gmbh.*, 428 F.2d 888 (5th Cir. 1970) and *Bethell v. Peace*, 441 F.2d. 495 (5th Cir. 1971). App., *infra*, 5a-6a. The majority interpreted *Unterweser* and *Bethell* as holding that an injunction is appropriate if the foreign action would result in "inequitable hardship" and "tend to frustrate and delay the speedy and efficient determination of the cause."[5] App., *infra*, 5a.

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[5] Citing *Unterweser*, the majority further noted that antisuit injunctions have been granted when the foreign litigation would (1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing court's in rem or quasi in rem jurisdiction; or (4) prejudice other equitable considerations. App., *infra*, 5a-6a.

The majority stated that the Ninth Circuit has adopted and the Seventh Circuit has inclined toward this approach. App., *infra*, 5a-6a. The majority then contended that the standard employed by other circuits "elevates principles of international comity to the virtual exclusion of essentially all other co ssiderations." App., *infra*, 6a. The majority declined "to require a district court to genuflect before a vague and omnipotent notion of comity every time that it must decide whether to enjoin a foreign action." App., *infra*, 7a.

In applying the Ninth Circuit test, the majority relied upon the following facts: (1) this is a contract dispute between private parties; (2) the dispute had been "long and firmly ensconced" within the United States judicial system; (3) Achilles consented to jurisdiction in Texas and stipulated that Texas law and the English language would govern any dispute; and (4) Achilles appeared in the Texas action, removed the case to federal court, and engaged in discovery before filing the Japanese action. App., *infra*, 7a. As a result, the court of appeals concluded that the district court's grant of injunctive relief had not "trampled on notions of comity"; that prosecution of the Japanese action would result in duplication of effort and "unwarranted inconvenience, expense, and vexation"; and that Achilles's Japanese action "smack[ed] of cynicism, harassment, and delay." App., *infra*, 7a-8a.

Judge Emilio Garza dissented because the majority's opinion did not "grant the principle of international comity the weight it deserves." App., *infra*, 12a. Judge Garza argued that, although somewhat elusive, "comity represents a principle of paramount importance in our world of ever increasing economic interdependence." App.,

infra, 11a. Judge Garza further argued that, under concurrent jurisdiction, "parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as *res judicata* in the other." App., *infra*, 12a (citing *Laker Airways*, 731 F.2d at 926-27). Because antisuit injunctions are contrary to this principle, effectively prohibit a foreign court from exercising jurisdiction, and convey the message that the issuing court has little confidence in the foreign court's ability to fairly decide the dispute, Judge Garza asserted that antisuit injunctions should be granted only in very limited circumstances. App., *infra*, 13a-14a.

Judge Garza cautioned that enjoining parties from litigating a foreign action could cause the foreign court either to issue a similar injunction thereby preventing any party from obtaining relief or to refuse to enforce any subsequent foreign judgment. App., *infra*, 14a. He also warned that injunctions of foreign actions could have a negative impact on international commerce. App., *infra*, 14a. Accordingly, he cautioned the exercise of exclusive jurisdiction over international commerce is "an intrusion into the realm of international economic *policy*" that is best left to the legislature and the treaty making process. App., *infra*, 14a.

The dissent criticized the majority holding because it appeared to require an affirmative showing that the granting of injunctive relief "would immediately and concretely affect adversely" international relations. App., *infra*, 15a. Judge Garza suggested that this requirement is "unrealistic and shortsighted" because the potential harm to international comity created by an antisuit injunction will often be "as difficult to predict, as it will be to remedy."

App., *infra*, 16a. Judge Garza concluded this uncertainty mandates deference to comity. App., *infra*, 16a.

The dissent also criticized the majority's adoption of a rule that relies upon the duplicative nature of the foreign action and the resulting inconvenience, expense, and vexation, because these factors are likely to be present whenever there is an exercise of concurrent jurisdiction and this analysis is more appropriate in a motion to dismiss for forum non conveniens. App., *infra*, 16a-19a.

Judge Garza urged the adoption of the standard followed by the District of Columbia, Second, and Sixth Circuits, whereby an antisuit injunction is granted only when the foreign action (1) threatens the jurisdiction of the district court or (2) is an attempt to evade important public policies of the district court. App., *infra*, 20a (citing *Gau Shan Co.*, 956 F.2d at 1335; *China Trade & Dev. Corp.*, 837 F.2d at 36; *Laker Airways*, 731 F.2d at 927). Judge Garza argued that this standard was not met in the present case.[6] App., *infra*, 25a.

Finally, Judge Garza distinguished the Fifth Circuit precedent relied upon by the majority and concluded it is

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[6] The dissent pointed out there was no evidence in the record to support the majority's inference of impure motives to Achilles based upon the several months delay in filing the Japanese action. App., *infra*, 17a n.7; *see China Trade & Dev. Corp.*, 837 F.2d at 34 (second suit filed two and one-half years after first). The dissent also criticized the majority's reliance upon the jurisdictional provisions of the distributorship agreement because the district court had found they were permissive, not mandatory. App., *infra*, 17a n.7.

not controlling. App., *infra*, 23a-24a. He stated that *Unterweser* involved in rem jurisdiction and *Bethell* involved an injunction after judgment was granted. App., *infra*, 23a-24a. As a result, the facts of both *Unterweser* and *Bethell* would merit injunctions under the standard urged by the dissent, and adoption of the dissent's standard would not require that they be overruled. App., *infra*, 23a-24a.

Achilles's petition for panel rehearing and suggestion for rehearing en banc were denied.

REASONS FOR GRANTING THE PETITION

I. There Is a Split of Authority Among the Circuits That This Court Should Resolve.

Both the district court and the court of appeals recognized there is a split of authority among the circuits as to the appropriate standard to employ when deciding whether to enjoin a parallel foreign action. The District of Columbia, Second, and Sixth Circuits, in accordance with the interests of international comity and the principles of concurrent jurisdiction, have expressly held that an anti-suit injunction should be entered only when the foreign action (1) threatens the jurisdiction of the district court or (2) is an attempt to evade important public policies of the district court. *See Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349 (6th Cir. 1992); *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d Cir. 1987); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir.

1984). Earlier decisions from the First and Third Circuits also appear to follow this rule. *See Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am.*, 651 F.2d 877, 887 (3d Cir. 1981) (duplication of issues and delay in filing foreign action "did not justify the breach of comity among the courts of separate sovereignties"; therefore, the order granting injunction was reversed); *Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577, 578-79 (1st Cir. 1969) (relying upon principles of comity, vacated district court's injunction of foreign action, notwithstanding possible inconvenience and duplication). *See also Mutual Serv. Casualty Ins. Co. v. Frit Indus.*, 805 F. Supp. 919, 921, 923 (M.D. Ala. 1992) (rejecting contention that duplication of parties and issues supplemented by some showing of judicial economy, race to judgment, or potentially inconsistent judgments would justify an injunction against parallel in personam foreign proceeding, and requiring circumstances outweighing comity and respect for concurrent foreign proceedings), *aff'd mem.*, 3 F.3d 442 (11th Cir. 1993).

The majority below followed the minority rule advocated by the Ninth and Seventh Circuits, which have either held or inclined toward holding that an antisuit injunction is appropriate any time it would avoid delay, expense, inconvenience, or potentially inconsistent results. *See Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425 (7th Cir. 1993); *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852 (9th Cir. 1981), *cert. denied sub nom. Northwest Sports Enter., Ltd. v. Seattle Totems Hockey Club, Inc.*, 457 U.S. 1105 (1982). *See also*

Cargill, Inc. v. Hartford Accident & Indem. Co., 531 F. Supp. 710 (D. Minn. 1982) (injunction granted based upon same parties and issues, convenience of parties, interest of judicial economy, risk of inconsistent results, potential race to judgment, and vexatiousness).

As discussed in detail, *infra*, the majority and dissent of the court of appeals differed in their interpretation of prior Fifth Circuit decisions, *Bethell v. Peace*, 441 F.2d 495 (5th Cir. 1971) and *In re Unterweser Reederei, Gmbh.*, 428 F.2d 888 (5th Cir. 1970), *aff'd on reh'g en banc*, 446 F.2d 907 (1971), *vacated on other grounds sub nom. M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). The majority viewed *Bethell* and *Unterweser* as requiring adoption of the Ninth Circuit rule, while the dissent found them to be consistent with the standard employed by the District of Columbia, Second, and Sixth Circuits.[7]

There is no realistic prospect of resolution of this conflict among the circuits without a decision by this Court. Since the District of Columbia Circuit's decision in *Laker Airways* and the Ninth Circuit's decision in *Seattle Totems*, courts have simply sided with either the District of Columbia Circuit or the Ninth Circuit, thereby increasing the split. Moreover, there is significant confusion about the holdings of early decisions addressing these

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[7] These two decisions have been the subject of much confusion. Both courts that give deference to comity in considering antisuit injunctions and courts that decline to give deference to comity have cited these decisions in support of their respective positions. *Compare Seattle Totems Hockey Club, Inc.*, 652 F.2d at 855 (declining to give deference to comity) *with Mutual Serv. Casualty Ins. Co.*, 805 F. Supp. at 924 (giving deference to comity).

issues, including *Unterweser* and *Bethell*, which exacerbates the problem for courts considering requests for injunctive relief. This case provides an opportunity to resolve this conflict, and, Petitioner submits, the Court should take it.

II. This Case Is Important Because It Affects International Comity.

This Court has long recognized the importance of comity. In *Hilton v. Guyot*, 159 U.S. 113 (1895), the Court stated:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

159 U.S. at 163-64.[8] As the District of Columbia Circuit emphasized in *Laker Airways*, "comity serves our

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[8] One commentator has observed:

> Comity has been defined variously as the basis of international law, a rule of international law, a synonym for private international law, a rule of choice of law, courtesy, politeness, convenience or goodwill among sovereigns, a moral necessity, expediency, reciprocity or considerations of high international politics concerned with maintaining amicable and workable relationships between nations.

Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 1-2 (1991) (footnotes omitted).

international system like the mortar which cements together a brick house. No one would willingly permit the mortar to crumble or be chipped away for fear of compromising the entire structure." 731 F.2d at 937. As Judge Garza recognized in the dissent below, "[i]nternational comity represents a principle of paramount importance in our world of ever increasing economic interdependence." App., *infra*, 11a. In this increasingly international market, commercial transactions involving players from multiple nations are commonplace. *Gau Shan Co.*, 956 F.2d at 1354. Each of these transactions presents the possibility for concurrent jurisdiction in the courts of the nations of the parties involved concerning any dispute arising out of the transaction. *Id.*

The issuance of an antisuit injunction runs counter to the principle of tolerating concurrent proceedings. App., *infra*, 13a. Although an injunction is addressed only to the parties, it effectively restricts the foreign court's ability to exercise its jurisdiction; thus, principles of international comity must be considered. *Gau Shan Co.*, 956 F.2d at 1354; *China Trade & Dev. Corp.*, 837 F.2d at 35; *Laker Airways*, 781 F.2d at 927. Furthermore, such an injunction conveys the message that "the issuing court has so little confidence in the foreign court's ability to adjudicate a given dispute fairly and efficiently that it is unwilling even to allow the possibility." *Gau Shan Co.*, 956 F.2d at 1355. In a case such as this, where parties to an international commercial transaction file separate suits in different forums, the availability of antisuit injunctions presents the possibility that both a foreign court and a United States court could issue injunctions preventing the other action from proceeding and, thus, both actions

would be paralyzed and neither party would be able to obtain any relief.[9] *Gau Shan Co.*, 956 F.2d at 1354-55. The detrimental consequences of these actions could "reverberate far beyond the particular dispute." App., *infra*, 11a.

Moreover, international commerce depends on the ability of merchants to predict the likely consequence of their actions in overseas markets. *Gau Shan Co.*, 956 F.2d at 1355. This predictability depends, in turn, on "an atmosphere of cooperation and reciprocity between nations." *Id.* The issuance of antisuit injunctions threatens this predictability and makes cooperation and reciprocity between courts of different nations less likely. *Id.*

The majority below implies that international comity issues can arise only if the case implicates a public international issue that threatens relations between the United States and the foreign country. App., *infra*, 7a-8a, 15a-16a. However, as Judge Garza reasoned, insisting on evidence of concrete harm is both "unrealistic and short sighted" because the potential harm to international comity is difficult to predict and remedy. App., *infra*, 16a. This is precisely the reason courts should "make the respectful deference underlying international comity the rule rather than the exception." App., *infra*, 16a. Issues of comity can arise in commercial disputes between private parties as well as disputes involving public policy issues. In fact,

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[9] The foreign court also may be less inclined to enforce a foreign judgment. *Gau Shan Co.*, 956 F.2d at 1355; *Laker Airways*, 731 F.2d at 927. However, refusal to enforce a foreign judgment is less offensive than prohibiting the foreign court from hearing the matter in the first place. *See Gau Shan Co.*, 956 F.2d at 1355.

like the present case, both *China Trade* and *Gau Shan Co.* involved private, commercial disputes without any international public policy issues. *See Gau Shan Co.*, 956 F.2d at 1351-52; *China Trade & Dev. Corp.*, 837 F.2d at 34-35.

Finally, as Judge Garza recognized, "[a]micable relations among sovereign nations and their judicial systems depend on our recognition, as federal courts, that we share the international arena with co-equal judicial bodies." App., *infra*, 12a. The central precept of comity teaches that, when possible, decisions of foreign tribunals should be given effect, thereby fostering international cooperation and reciprocity, and, as a result, "promoting predictability and stability through satisfaction of mutual expectations." *Laker Airways*, 731 F.2d at 937. Comity compels our courts to act at all times to "increase the international legal ties that advance the rule of law within and among nations." *Id.*

The primary difference in the two standards employed by courts when considering injunctions of parallel foreign actions is the level of respect afforded principles of international comity. The District of Columbia, First, Second, Third, and Sixth Circuits start from the premise that comity is the most important concern and that parallel proceedings are generally acceptable. The Ninth Circuit, Seventh Circuit, and court of appeals below regard comity as less important than the inconveniences that tend to result from parallel proceedings. This Court should grant certiorari to clarify the role of international comity in determining antisuit injunctions.[10]

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[10] Commentators have frequently addressed the use of antisuit injunctions in international litigation, the split in the

III. The Decision of the Court of Appeals Is Erroneous.

It is well settled that federal courts have the power to enjoin foreign suits by persons subject to their jurisdiction. *See Gau Shan Co.*, 956 F.2d at 1352; *China Trade & Dev. Corp.*, 837 F.2d at 35; *Laker Airways*, 731 F.2d at 926; *Seattle Totems Hockey Club, Inc.*, 652 F.2d at 855. It is also well settled that parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until judgment is reached in one proceeding that can be pled as res judicata in the other. *See Gau Shan Co.*, 956 F.2d at 1352; *China Trade & Dev. Corp.*, 837 F.2d at 36; *Laker Airways*, 731 F.2d at 926-27; *cf. Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 466 (1939) (both state and federal courts may proceed with the litigation at least until judgment is obtained in one action that will act as res judicata in the other); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 230 (1922) (same).

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circuits regarding the standard to be used in granting antisuit injunctions, and the role of international comity in antisuit injunctions. *See, e.g.*, Julie E. Dowler, Note, *Forging Finality: Searching for a Solution to the International Double-Suit Dilemma*, 4 DUKE J. COMP. & INT'L L. 363 (1994); Thomas E. Burck, Note, *Gau Shan Co. v. Bankers Trust Co.: What Should Be the Role of International Comity in the Issuance of Antisuit Injunctions?*, 18 N.C. J. INT'L L. & COM. REG. 475 (1993); George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589 (1990); Trevor C. Hartley, *Comity and the Use of Antisuit Injunctions in International Litigation*, 35 AM. J. COMP. L. 487 (1987); Note, *Antisuit Injunctions and International Comity*, 71 VA. L. REV. 1039 (1985); Teresa D. Baer, Note, *Injunctions Against the Prosecution of Litigation Abroad: Towards a Transnational Approach*, 37 STAN. L. REV. 155 (1984).

In the instant case, the majority opinion adopts the view of the Ninth Circuit, which holds that the district court does not abuse its discretion by issuing an antisuit injunction against a foreign suit if such a suit would result in inequitable hardship, tend to frustrate and delay the speedy and efficient determination of the cause, and result in unwarranted inconvenience, expense, and vexation. App., *infra*, 4a-8a. Delay, inconvenience, expense, hardship, and vexation are likely to be present whenever there is an exercise of concurrent jurisdiction by a foreign court. *Gau Shan Co.*, 956 F.2d at 1355; *China Trade & Dev. Corp.*, 837 F.2d at 36; *Sea Containers Ltd. v. Stena AB*, 890 F.2d 1205, 1213-14 (D.C. Cir. 1989). Thus, under such a rule, concurrent jurisdiction involving a foreign tribunal would rarely, if ever, withstand the request for an antisuit injunction. App., *infra*, 17a; *Gau Shan Co.*, 956 F.2d at 1355. This is inconsistent with the rule permitting parallel in personam proceedings. *Laker Airways*, 731 F.2d at 928.

Furthermore, focusing, as the majority of the court of appeals did, upon the potential hardship of a party having to litigate in two forums is an analysis more appropriate for a motion to dismiss on the ground of forum non conveniens. *See Laker Airways*, 731 F.2d at 928. Potential hardship alone does not outweigh the important principles of comity that compel deference and mutual respect for concurrent foreign proceedings. *Gau Shan Co.*, 956 F.2d at 1355. A dismissal by either court on forum non conveniens would satisfy the majority's concern regarding duplication of lawsuits without negatively impacting comity. By granting the antisuit injunction, the district

court effectively made that determination for the Japanese court. Granting an injunction is particularly inappropriate in the present case where the district court found that the forum selection clause was permissive and that Japan would be an adequate forum for both parties. App., *infra*, 27a-29a. Furthermore, in this case, the events, transactions, and occurrences giving rise to the dispute occurred almost exclusively in Japan; the parties have identified more than 140 witnesses located in Japan, Hong Kong, or Taiwan; and much of the case will involve the Japanese athletic shoe market.

The majority opinion below asserts that Achilles's filing of its Japanese action "smacks of cynicism, harassment, and delay." App., *infra*, 8a. There is no evidence of any ill motive on behalf of Achilles in seeking to pursue its action against Kaepa in its own forum, and the filing of the Japanese action several months after Achilles was sued in the United States does not support the majority's charge. *See China Trade & Dev. Corp.*, 832 F.2d at 34-35 (vacating injunction although second suit filed two and one-half years after incident and one and one-half years after first suit; United States trial was about to begin; and defendant had appeared and never asserted forum non conveniens); *Compagnie des Bauxites de Guinea*, 651 F.2d at 880, 887 (reversing injunction although second suit filed almost four years after first). Moreover, as recognized by Judge Garza, any perceived ill motives are outweighed by the concern for international comity. App., *infra*, 18a n.7, 25a.

The majority held that it was bound by stare decisis to follow the only two prior Fifth Circuit cases that address in any way the issue of enjoining parallel foreign

actions. *See In re Unterweser Reederei, Gmbh.*, 428 F.2d at 888; *Bethell*, 441 F.2d at 495. However, as pointed out by the dissent, neither of these cases discusses international comity in detail, both are distinguishable from the present case, and both are consistent with the standard adopted by the District of Columbia, Second, and Sixth Circuits. App., *infra*, 23a & n.13.

In *Bethell*, the Fifth Circuit held that a federal district court in Florida could properly enjoin the defendant, a Florida citizen, from pursuing litigation in a foreign forum on a contract (signed in Florida) that had been determined by the district court on summary judgment to be invalid. 441 F.2d at 498. The district court did not enjoin the foreign lawsuit until after judgment had been entered. As a result, the Fifth Circuit found the district court could enter an injunction preventing future harassing litigation on the same issue. *Id.* The Fifth Circuit did not discuss international comity because the party enjoined was a resident of the forum state, Florida. *Id.* at 496, 498. Instead, it relied on Florida law and " '[the] power of a court of equity of one state to restrain *its own citizens* from prosecuting actions in a sister state when such actions serve to vex, harass, or oppress an opponent'." *Id.* at 498 (emphasis added) (quoting *Groff G.M.C. Trucks v. Driggers*, 101 So.2d 58 (Fla. Dist. Ct. App. 1958)). In this case, in contrast, the injunction precludes a Japanese citizen from resorting to the courts of its own country.

In *Unterweser*, an in rem proceeding, the Fifth Circuit held it was within the trial court's discretion to enjoin the foreign action. 428 F.2d at 895-96. In addition to protecting the district court's in rem jurisdiction, the *Unterweser*

injunction was justified because the foreign litigation sought to enforce provisions of a contract that were contrary to domestic policy and unenforceable in American courts. *Id.* at 896.

Unlike the present case, *Bethell* and *Unterweser* involved challenges to the enjoining court's jurisdiction and protection of important public policies and, thus, are consistent with the standard of the District of Columbia, Second, and Sixth Circuits for evaluating the issuance of antisuit injunctions. Accordingly, the court of appeals' decision that it was bound by prior Fifth Circuit opinions to uphold the district court's orders enjoining Achilles from proceeding with its Japanese action is incorrect.

The standard adopted by the District of Columbia, Second, and Sixth Circuits more satisfactorily respects the principles of concurrent jurisdiction and international comity. Under this standard, district courts should look to only two factors in determining whether to issue an antisuit injunction: (1) does the foreign action threaten the jurisdiction of the district court, and (2) is the foreign action an attempt to evade important public policies of the district court?[11] *Gau Shan Co.*, 956 F.2d at 1355; *China Trade & Dev. Corp.*, 837 F.2d at 36; *Laker Airways*, 731 F.2d at 927; App., *infra*, 20a. As recognized in *Laker Airways*,

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[11] The dissent below noted that federal courts are "required to apply a similarly strict standard in tolerance of concurrent state court proceedings." App., *infra*, 20a n.10 (citing 28 U.S.C. § 2283 (1994)); *see also Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281 (1970). The dissent further noted that this "rule of restraint and respect regarding state court proceeding[s] should apply with even greater force in the context of foreign tribunals." App., *infra*, 20a n.10.

when the foreign action threatens to paralyze the jurisdiction of the court or is an attempt to carve out exclusive jurisdiction of the action, an injunction is primarily defensive and may be necessary to protect the court's jurisdiction. 731 F.2d at 927. Likewise, an injunction may be appropriate when a party attempts to evade important public policies in the forum by bringing suit in a foreign action.[12] *Gau Shan Co.*, 956 F.2d at 1357. The issuance of injunctions in both of these circumstances is consistent with principles of comity. It is undisputed that neither of these circumstances exists in the present case.

Petitioner submits that due regard for the principles of international comity should dictate that this Court adopt the rule of the District of Columbia, Second, and Sixth Circuits for enjoining parallel foreign actions. Under this rule, the Japanese action should not have been enjoined because there is no evidence that it either threatens the district court's jurisdiction or evades important public policies. The district court erred in applying the Ninth Circuit test and granting the antisuit injunction. This Court should grant certiorari to clarify the standard for granting antisuit injunctive relief and correct the court of appeals' erroneous decision in this case.

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[12] This principle is similar to the rule that a court is not required to give effect to a foreign judgment that does violence to the forum's own fundamental interests. *Laker Airways*, 731 F.2d at 931. The availability of slight advantages in the foreign procedural or substantive law does not signify actionable evasion of domestic public policies. *Gau Shan Co.*, 956 F.2d at 1357; *China Trade & Dev. Corp.*, 837 F.2d at 37; *Laker Airways*, 731 F.2d at 931 n.73.

CONCLUSION

Based upon the reasons set forth herein, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

June 14, 1996

KAEPA, INC., Plaintiff-Appellee,

v.

ACHILLES CORPORATION, Defendant-Appellant.

No. 95-50278.

United States Court of Appeals,
Fifth Circuit.

Feb. 14, 1996.

Plaintiff filed motion to enjoin foreign defendant from prosecuting same or similar action in foreign country regarding distribution contract dispute. The United States District Court for the Western District of Texas, Edward C. Prado, J., granted antisuit injunction. Foreign defendant appealed. The Court of Appeals, Wiener, Circuit Judge, held that: (1) granting of antisuit injunction was not abuse of discretion; (2) district court did not violate preliminary injunction notice requirements by failing to conduct oral hearing before granting antisuit injunction; and (3) district court had discretion to not require security by plaintiff before issuing antisuit injunction.

Affirmed.

Emilio M. Garza, Circuit Judge, dissented and filed opinion.

Seagal V. Wheatley, John Frank Onion, III, Wheatley & Onion, San Antonio, TX, for Plaintiff-Appellee.

Retta A. Miller, Gordon M. Shapiro, Jackson & Walker, Dallas, TX, for Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas.

Before WIENER, EMILIO M. GARZA, and BENAVIDES, Circuit Judges.

WIENER, Circuit Judge:

The primary issue presented by this appeal is whether the district court erred by enjoining Defendant-Appellant Achilles Corporation from prosecuting an action that it filed in Japan as plaintiff, which essentially mirrored a lawsuit previously filed by Plaintiff-Appellee Kaepa, Inc. in state court and then being prosecuted in federal district court by Kaepa. Given the private nature of the dispute, the clear indications by both parties that claims arising from their contract should be adjudicated in this country, and the duplicative and vexatious nature of the Japanese action, we conclude that the district court did not abuse its discretion by barring the prosecution of the foreign litigation. Accordingly, we affirm the grant of the antisuit injunction.

I.

FACTS AND PROCEEDINGS

This case arises out of a contractual dispute between two sophisticated, private corporations: Kaepa, an American company which manufactures athletic shoes; and Achilles, a Japanese business enterprise with annual sales that approximate one billion dollars. In April 1993, the two companies entered into a distributorship agreement whereby Achilles obtained exclusive rights to market Kaepa's footwear in Japan. The distributorship agreement expressly provided that Texas law and the English language would govern its interpretation, that it would be

enforceable in San Antonio, Texas, and that Achilles consented to the jurisdiction of the Texas courts.[1]

Kaepa grew increasingly dissatisfied with Achilles's performance under the contract. Accordingly, in July of 1994, Kaepa filed suit in Texas state court, alleging (1) fraud and negligent misrepresentation by Achilles to induce Kaepa to enter into the distributorship agreement, and (2) breach of contract by Achilles. Thereafter, Achilles removed the action to federal district court, and the parties began a laborious discovery process which to date has resulted in the production of tens of thousands of documents. In February 1995, after appearing in the Texas action, removing the case to federal court, and engaging in comprehensive discovery, Achilles brought its own action in Japan, alleging mirror-image claims: (1) fraud by Kaepa to induce Achilles to enter into the distributorship agreement, and (2) breach of contract by Kaepa.

Back in Texas, Kaepa promptly filed a motion asking the district court to enjoin Achilles from prosecuting its suit in Japan (motion for an antisuit injunction). Achilles

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[1] The applicable language of the agreement reads:

> This Agreement shall be governed by the laws of the State of Texas, U.S.A., and shall be enforceable in San Antonio, Texas. The English version of this Agreement and the English language shall govern the interpretation and meaning of all words and phrases used herein. Distributor [Achilles] consents to jurisdiction in the State of Texas, U.S.A.

The district court held that this clause (1) permits jurisdiction in Texas, and (2) requires that the agreement be interpreted under United States law and the English language. Neither party challenges this ruling.

in turn moved to dismiss the federal court action on the ground of forum non conveniens. The district court denied Achilles's motion to dismiss and granted Kaepa's motion to enjoin, ordering Achilles to refrain from litigating the Japanese action and to file all of its counterclaims with the district court. Achilles timely appealed the grant of the antisuit injunction.[2]

II.

ANALYSIS

A. Propriety of the Antisuit Injunction

Achilles's primary argument is that the district court failed to give proper deference to principles of international comity when it granted Kaepa's motion for an antisuit injunction. We review the decision to grant injunctive relief for abuse of discretion.[3] Under this deferential standard, findings of fact are upheld unless clearly erroneous, whereas legal conclusions " 'are subject to broad review and will be reversed if incorrect.' "[4]

It is well settled among the circuit courts – including this one – which have reviewed the grant of an antisuit injunction that the federal courts have the power to

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[2] Achilles does not challenge the denial of its motion to dismiss.

[3] *See Western Directories, Inc. v. Southwestern Bell*, 63 F.3d 1378, 1390 (5th Cir.1995); *Apple Barrel Productions, Inc. v. Beard*, 730 F.2d 384, 386 (5th Cir.1984).

[4] *Apple Barrel Productions, Inc. v. Beard*, 730 F.2d 384 (5th Cir.1984) (quoting *Commonwealth Life Insurance Co. v. Neal*, 669 F.2d 300, 304 (5th Cir.1982)).

enjoin persons subject to their jurisdiction from prosecuting foreign suits.[5] The circuits differ, however, on the proper legal standard to employ when determining whether that injunctive power should be exercised.[6] We have addressed the propriety of an antisuit injunction on two prior occasions, in *In re Unterweser Reederei Gmbh*[7] and *Bethell v. Peace.*[8] Emphasizing in both cases the need to prevent vexatious or oppressive litigation, we concluded that a district court does not abuse its discretion by issuing an antisuit injunction when it has determined "that allowing simultaneous prosecution of the same action in a foreign forum thousands of miles away would result in 'inequitable hardship' and 'tend to frustrate and delay the speedy and efficient determination of the cause.' "[9] The Seventh and the Ninth Circuits have either

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[5] *See, e.g., Gau Shan Co., Ltd. v. Bankers Trust Co.*, 956 F.2d 1349, 1352 (6th Cir.1992); *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir.1987); *Laker Airways v. Sabena*, 731 F.2d 909, 926 (D.C.Cir.1984); *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852, 855 (9th Cir.1981), *cert. denied*, 457 U.S. 1105, 102 S.Ct. 2902, 73 L.Ed.2d 1313 (1982); *In re Unterweser Reederei Gmbh*, 428 F.2d 888, 890 (5th Cir.1970), *aff'd on rehearing en banc*, 446 F.2d 907 (1971), *rev'd on other grounds sub nom. M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972); *Bethell v. Peace*, 441 F.2d 495, 498 (5th Cir.1971).

[6] *Compare, e.g., Seattle Totems*, 652 F.2d at 855-56 and *Unterweser*, 428 F.2d 888 *with Gau Shan*, 956 F.2d at 1355 *and China Trade*, 837 F.2d at 36.

[7] *Unterweser*, 428 F.2d 888.

[8] *Bethell*, 441 F.2d 495.

[9] *Unterweser*, 428 F.2d at 890, 896 (noting as well that antisuit injunctions have been granted when foreign litigation would (1) frustrate a policy of the forum issuing the injunction;

adopted[10] or "incline[d] toward"[11] this approach, but other circuits have employed a standard that elevates principles of international comity to the virtual exclusion of essentially all other considerations.[12]

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(2) be vexatious or oppressive; (3) threaten the issuing court's in rem or quasi in rem jurisdiction; or (4) prejudice other equitable considerations); *see also Bethell*, 441 F.2d at 498 ("[T]he court was within its discretion in relieving the plaintiff of expense and vexation of having to litigate in a foreign court."). *Cf. Gau Shan*, 956 F.2d at 1353 (concluding that the Fifth Circuit "rel[ies] primarily upon considerations of vexatiousness or oppressiveness in a race to judgment in the foreign forum as sufficient grounds for an [antisuit] injunction") (citing *Unterweser*, 428 F.2d at 896); *Seattle Totems*, 652 F.2d at 855-56 (discussing *Unterweser* and *Bethell*).

[10] *See Seattle Totems*, 652 F.2d at 855-56 (discussing *Unterweser* and *Bethell*) (holding that it is within the district court's discretion to grant an antisuit injunction when the adjudication of an issue "is likely to result in unnecessary delay and substantial inconvenience and expense to the parties and witnesses . . . [as well as] inconsistent rulings or even a race to judgment").

[11] *See Philips Medical Sys. Int'l B.V. v. Bruetman*, 8 F.3d 600, 605 (7th Cir.1993); *see also Allendale Mut. Ins. Co. v. Bull Data Systems, Inc.*, 10 F.3d 425, 431 (7th Cir.1993). *Cf. Sperry Rand Corp. v. Sunbeam Corp.*, 285 F.2d 542 (7th Cir.1960).

[12] *See, e.g., Gau Shan*, 956 F.2d at 1355; *China Trade*, 837 F.2d at 36; *Laker Airways*, 731 F.2d at 927, 937. The weakness in the foundation of the dissent's opinion is that it relies extensively on these cases while virtually disregarding our holdings in *Unterweser* and *Bethell*. The strict stare decisis policy of this court prevents us from joining in the dissent's abrogation of the holdings of two prior panels on this issue through purported distinctions without real differences. *See United States v. Parker*, 73 F.3d 48, 51 (5th Cir.1996) (" '[O]ne panel may not overrule the decision – right or wrong – of a prior panel, absent *en banc* reconsideration or a superseding contrary decision of the

Achilles urges us to give greater deference to comity and apply the latter, more restrictive standard. We note preliminarily that, even though the standard espoused in *Unterweser* and *Bethell* focuses on the potentially vexatious nature of foreign litigation, it by no means excludes the consideration of principles of comity. We decline, however, to require a district court to genuflect before a vague and omnipotent notion of comity every time that it must decide whether to enjoin a foreign action.

In the instant case, for example, it simply cannot be said that the grant of the antisuit injunction actually threatens relations between the United States and Japan. First, no public international issue is implicated by the case: Achilles is a private party engaged in a contractual dispute with another private party. Second, the dispute has been long and firmly ensconced within the confines of the United States judicial system: Achilles consented to jurisdiction in Texas; stipulated that Texas law and the English language would govern any dispute; appeared in an action brought in Texas; removed that action to a federal court in Texas; engaged in extensive discovery pursuant to the directives of the federal court; and only then, with the federal action moving steadily toward trial, brought identical claims in Japan. Under these circumstances, we cannot conclude that the district court's grant of an antisuit injunction in any way trampled on notions of comity.

Supreme Court' ") (quoting *In re Dyke*, 943 F.2d 1435, 1442 (5th Cir.1991)).

On the contrary, the facts detailed above strongly support the conclusion that the prosecution of the Japanese action would entail "an absurd duplication of effort"[13] and would result in unwarranted inconvenience, expense, and vexation. Achilles's belated ploy of filing as putative plaintiff in Japan the very same claims against Kaepa that Kaepa had filed as plaintiff against Achilles smacks of cynicism, harassment, and delay. Accordingly, we hold that the district court did not abuse its discretion by granting Kaepa's motion for an antisuit injunction.[14]

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[13] *Allendale*, 10 F.3d at 430-31.

[14] The parties also debated the applicability of Federal Rule of Civil Procedure 13(a) to claims brought in foreign courts. Rule 13(a) governs compulsory counterclaims and provides in relevant part: "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. . . . " FED.R.CIV.P. 13(a).

Achilles concedes that under Rule 13, the Japanese action constitutes a compulsory counterclaim. Nonetheless, Achilles argues that Rule 13 does not apply to claims brought in foreign courts and thus cannot be relied on as a basis for prohibiting the prosecution of the Japanese action. As we have decided on other grounds that the district court properly exercised its authority in enjoining the Japanese action, we need not address whether Rule 13 governs foreign suits. We note, however, that our holding today is consistent with the purpose of Rule 13, which is to " 'prevent multiplicity of actions and to achieve resolution in a single suit of all disputes arising out of common matters.' " *Seattle Totems*, 652 F.2d at 854 (quoting *Southern Construction Co. v. Pickard*, 371 U.S. 57, 83 S.Ct. 108, 9 L.Ed.2d 31 (1962)).

B. Rule 65 Requirements

Achilles also argues that the district court erred by failing to meet several requirements of Federal Rule of Civil Procedure 65 before issuing the antisuit injunction. Rule 65(a)(1) provides that "[n]o preliminary injunction shall be issued without notice to the adverse party." We have interpreted the notice requirement of Rule 65(a)(1) to mean that "where factual disputes are presented, the parties must be given a fair opportunity and a meaningful hearing to present their differing versions of those facts before a preliminary injunction may be granted."[15] If no factual dispute is involved, however, no oral hearing is required; under such circumstances the parties need only be given "ample opportunity to present their respective views of the legal issues involved."[16] In the instant case, the district court did not rely on any disputed facts in determining whether it could properly grant an antisuit injunction. Moreover, both parties presented comprehensive memoranda in support of their positions on the issue. Accordingly, the district court did not violate Rule 65(a)(1) by failing to conduct an oral hearing before granting the antisuit injunction.

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[15] *Commerce Park at DFW Freeport v. Mardian Construction Co.*, 729 F.2d 334, 342 (5th Cir.1984) (discussing *Marshall Durbin Farms, Inc. v. National Farmers Organization, Inc.*, 446 F.2d 353 (5th Cir.1971)).

[16] *Commerce Park*, 729 F.2d at 341; *see also Federal Savings and Loan Insurance Corp. v. Dixon*, 835 F.2d 554, 558 (5th Cir.1987). *Cf. Jones v. Newton*, 775 F.2d 1316, 1318 (noting that an oral hearing on motions is typically not required in this circuit); *Security and Exchange Commission v. First Financial Group of Texas, Inc.*, 659 F.2d 660, 669 (5th Cir.1981).

Achilles also argues that the district court violated Rule 65(c) by not requiring Kaepa to post a bond. Rule 65(c) provides that "[n]o . . . preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper. . . . "[17] In holding that the amount of security required pursuant to Rule 65(c) "is a matter for the discretion of the trial court,"[18] we have ruled that the court "may elect to require no security at all."[19] Thus, the district court did not violate Rule 65(c) by failing to compel Kaepa to post a bond.[20]

III.

CONCLUSION

For the foregoing reasons, the district court's grant of Kaepa's motion to enjoin the litigation of Achilles's action in Japan is

AFFIRMED.

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[17] FED.R.CIV.P. 65(c).

[18] *Corrigan Dispatch Company v. Casa Guzman*, 569 F.2d 300, 303 (5th Cir.1978); *see also City of Atlanta v. Metropolitan Atlanta Rapid Transit Authority*, 636 F.2d 1084, 1094 (5th Cir. Unit B Feb. 1981). *But see Continuum Company, Inc. v. Incepts, Inc.*, 873 F.2d 801, 803 (5th Cir.), *reconsidered on other grounds*, 883 F.2d 333 (5th Cir.1989).

[19] *Corrigan Dispatch*, 569 F.2d at 303.

[20] Moreover, under the instant facts – the party enjoined being the party that created any risk of damages for delay or duplication by filing the second, mirror-image suit in Japan after contractually consenting to the jurisdiction and substantive law of Texas – the district court cannot be said to have abused its discretion: The injunction can only work to avoid damages, not cause them.

EMILIO M. GARZA, Circuit Judge, dissenting:

International comity represents a principle of paramount importance in our world of ever increasing economic interdependence. Admitting that "comity" may be a somewhat elusive concept[1] does not mean that we can blithely ignore its cautionary dictate.[2] Unless we proceed in each instance with respect for the independent jurisdiction of a sovereign nation's courts, we risk provoking retaliation in turn, with detrimental consequences that may reverberate far beyond the particular dispute and its

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[1] As one commentator has observed:

> Comity has been defined variously as the basis of international law, a rule of international law, a synonym for private international law, a rule of choice of law, courtesy, politeness, convenience or goodwill between sovereigns, a moral necessity, expediency, reciprocity or considerations of high international politics concerned with maintaining amicable and workable relationships between nations.

Joel R. Paul, Comity in International Law, 32 Harv.Int'l L.J. 1, 1-2 (1991) (footnotes omitted).

[2] *See Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895), in which the Supreme Court stated:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under protection of its laws.

159 U.S. at 163-64, 16 S.Ct. at 143.

private litigants. Amicable relations among sovereign nations and their judicial systems depend on our recognition, as federal courts, that we share the international arena with co-equal judicial bodies, and that we therefore act to deprive a foreign court of jurisdiction only in the most extreme circumstances. Because I feel that the majority's opinion does not grant the principle of international comity the weight it deserves, I must respectfully dissent.

I

A

I do not quarrel with the well established principle, relied on by the majority, that our courts have the power to control the conduct of persons subject to their jurisdiction, even to the extent of enjoining them from prosecuting in a foreign jurisdiction. I write to emphasize, however, that under concurrent jurisdiction, "parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as *res judicata* in the other." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926-27 (D.C.Cir.1984).[3] The filing of a second parallel action in another jurisdiction does not necessarily conflict with or prevent the first

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[3] *See also Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 466, 59 S.Ct. 275, 280, 83 L.Ed. 285 (1939) ("[I]t is settled that where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other.").

court from exercising its legitimate concurrent jurisdiction. *Id.* at 926. In the ordinary case, both forums should be free to proceed to a judgment, unhindered by the concurrent exercise of jurisdiction in another court.[4]

The issuance of an antisuit injunction runs directly counter to this principle of tolerating parallel proceedings. An antisuit injunction "conveys the message . . . that the issuing court has so little confidence in the foreign court's ability to adjudicate a given dispute fairly and efficiently that it is unwilling even to allow the possibility." *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1355 (6th Cir.1992). It makes no difference that in formal

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[4] The Supreme Court in *Kline v. Burke Const. Co.*, 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226 (1922), had the following to say about concurrent jurisdiction:

> [A] controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of res adjudicata by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case. The rule, therefore, has become generally established that where the action first brought is in personam and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded.

260 U.S. at 230, 43 S.Ct. at 81.

terms the injunction is only addressed to the parties. The antisuit injunction operates to restrict the foreign court's ability to exercise its jurisdiction as effectively as if it were addressed to the foreign court itself. *Laker Airways*, 731 F.2d at 927; *see also Donovan v. City of Dallas*, 377 U.S. 408, 413, 84 S.Ct. 1579, 1582-83, 12 L.Ed.2d 409 (1964). Enjoining the parties from litigating in a foreign court will necessarily compromise the principles of comity, and may lead to undesirable consequences. For example, the foreign court may react by issuing a similar injunction, thereby preventing any party from obtaining a remedy. *Laker Airways*, 731 F.2d at 927. The foreign court may also be less inclined to enforce a judgment by our courts. The refusal to enforce a foreign judgment, however, is less offensive than acting to prevent the foreign court from hearing the matter in the first place. *Id.* at 931.

Antisuit injunctions intended to carve out exclusive jurisdiction may also have unintended, widespread effects on international commerce. Without "an atmosphere of cooperation and reciprocity between nations," the ability to predict future consequences of international transactions will inevitably suffer. *Id.* To operate effectively and efficiently, international markets require a degree of predictability which can only be harmed by antisuit injunctions and the resulting breakdown of cooperation and reciprocity between courts of different nations. *Id.* The attempt to exercise exclusive jurisdiction over international economic affairs is essentially an intrusion into the realm of international economic *policy* that should appropriately be left to our legislature and the

treaty making process.[5] As the court in *Laker Airways* stated, "Absent an explicit directive from Congress, this court has neither the authority nor the institutional resources to weigh the policy and political factors that must be evaluated when resolving competing claims of jurisdiction. In contrast, diplomatic and executive channels are, by definition, designed to exchange, negotiate, and reconcile the problems which accompany the realization of national interests within the sphere of international association." *Laker Airways*, 731 F.2d at 955.

The majority appears to require an affirmative showing that the granting of an antisuit injunction in this case would immediately and concretely affect adversely the relations between the United States and Japan. Unless there is evidence that this antisuit injunction would "actually threaten" the relations between the two countries, the majority is comfortable to assume otherwise. *Cf. Allendale Mut. Ins. Co. v. Bull Data Systems, Inc.*, 10 F.3d 425, 431-33 (7th Cir.1993) (requiring evidence of concrete

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[5] As the Sixth Circuit in *Gau Shan Co.* recognized:

> The days of American hegemony over international economic affairs have long since passed. The United States cannot today impose its economic will on the rest of the world and expect meek compliance, if indeed it ever could. The modern era is one of world economic interdependence, and economic interdependence requires cooperation and comity between nations.

Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1354 (6th Cir.1992). *See generally* Thomas E. Burke, Case Note, *Gau Shan Co. v. Bankers Trust Co.*: What Should Be the Role of International Comity in the Issuance of Antisuit Injunctions?, 18 N.C.J.Int'l L. & Com.Reg. 475 (1993).

harm to the foreign relations of the United States). Some courts have gone so far as to suggest that we might expect, for example, a representative of the foreign nation to convey their country's concern regarding the issuance of an antisuit injunction in that case. *See, e.g., id.* at 431; *Philips Medical Sys. Int'l B.V. v. Bruetman*, 8 F.3d 600, 605 (7th Cir.1993). Insisting on evidence of immediate and concrete harm, in the form of a diplomatic protest or otherwise, is both unrealistic and shortsighted. As with most transnational relations, the potential harm to international comity caused by the issuance of a specific antisuit injunction will be as difficult to predict, as it will be to remedy. It is precisely this troubling uncertainty, and the recognition that our courts are ill equipped to weigh these types of international policy considerations, that cautions us to make the respectful deference underlying international comity the rule rather than the exception.

B

In holding that the district court in this case did not abuse its discretion by enjoining Achilles, a Japanese corporation, from proceeding with its lawsuit filed in the sovereign nation of Japan, the majority appears to rely primarily on the duplicative nature of the Japanese suit and the resulting "unwarranted inconvenience, expense, and vexation."[6] The inconvenience, expense and

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[6] *Cf. In re Unterweser Reederei, Gmbh*, 428 F.2d 888, 890, 896 (5th Cir. 970) (affirming issuance of antisuit injunction where "allowing simultaneous prosecution of the same action in a foreign forum thousands of miles away would result in 'inequitable hardship' and 'tend to frustrate and delay the

vexation, however, are factors likely to be present whenever there is an exercise of concurrent jurisdiction by a foreign court. *Sea Containers Ltd. v. Stena AB*, 890 F.2d 1205, 1213-14 (D.C.Cir.1989). The majority's standard can be understood to hold, therefore, that "a duplication of the parties and issues, alone, is sufficient to justify a foreign antisuit injunction." *Gau Shan Co.*, 956 F.2d at 1353; *see also Laker Airways*, 731 F.2d at 928 (concluding that this rationale "is *prima facie* inconsistent with the rule permitting parallel proceedings in concurrent in personam actions"). Under this standard, concurrent jurisdiction involving a foreign tribunal will rarely, if ever, withstand the request for an antisuit injunction.

By focusing on the potential hardship to Kaepa of having to litigate in two forums,[7] the majority applies an

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speedy and efficient determination of the cause' "), rev'd on other grounds sub nom. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972); *Seattle Totems Hockey Club v. National Hockey League*, 652 F.2d 852, 856 (9th Cir.1981) (affirming antisuit injunction where adjudication in two separate actions was "likely to result in unnecessary delay and substantial inconvenience and expense to the parties and witnesses," and "could result in inconsistent rulings or even a race to judgment"), *cert. denied*, 457 U.S. 1105, 102 S.Ct. 2902, 73 L.Ed.2d 1313 (1982).

[7] I also believe the majority errs by relying on two other factors in this case. The majority reasons that the "clear indications by both parties that claims arising from their contract should be adjudicated in this country" lends support to the conclusion that the district court did not abuse its discretion by enjoining the foreign litigation. The majority reaches this conclusion even though the district court found that the jurisdictional language in the parties' agreement was *permissive* of Texas jurisdiction, rather than *exclusive*. The majority also

analysis that is more appropriately brought to bear in the context of a motion to dismiss for *forum non conveniens*.[8] See Laker Airways, 731 F.2d at 928. Considerations that

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appears to overlook the fact that this dispute involves experienced and sophisticated businessmen who were perfectly capable of negotiating an exclusive forum clause had they desired one. *See M/S Bremen v. Zapata*, 407 U.S. 1, 12- 13, 92 S.Ct. 1907, 1914, 32 L.Ed.2d 513 (1972) ("There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given effect."). Therefore, if anything, the district court's action – in reserving exclusive jurisdiction over this suit – runs directly counter to the parties' intentions, as evinced by their freely negotiated contract. *Cf. id.* ("The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts."). I am also not persuaded by the majority's reliance on the inference that Achilles' actions, by filing their action in Japan some seven or eight months after they were sued in Texas, "smacks of cynicism, harassment, and delay." *See China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 34-35 (2nd Cir.1987) (vacating injunction even though second suit was filed almost two-and-a-half years after initial suit); *Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am.*, 651 F.2d 877, 880, 887 (3d Cir.1981) (vacating injunction even though second suit was filed almost four years later). I do not believe that Achilles' impure motives, if any, should outweigh the important interests of international comity at issue in this case. *Cf. Donovan v. City of Dallas*, 377 U.S. 408, 415, 84 S.Ct. 1579, 1583, 12 L.Ed.2d 409 (1964) (Harlan, J., dissenting) (disagreeing with the majority's holding that the state court was without power to enjoin federal court proceedings even though the suit was found to be vexatious and harassing).

[8] On the doctrine of forum non conveniens, *see Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 258-61, 102 S.Ct. 252, 267-68, 70 L.Ed.2d 419 (1981).

are appropriate in deciding whether to decline jurisdiction are not as persuasive when deciding whether to deprive another court of jurisdiction. "The policies of avoiding hardships to the parties and promoting the economies of consolidation litigation 'do not outweigh the important principles of comity that compel deference and mutual respect for concurrent foreign proceedings. Thus, the better rule is that duplication of parties and issues alone is not sufficient to justify issuance of an antisuit injunction.' " *Gau Shan Co.*, 956 F.2d at 1355 (quoting *Laker Airways*, 731 F.2d at 928); *see also China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2nd Cir.1987); *Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am.*, 651 F.2d 877, 887 (3d Cir.1981), *aff'd on other grounds sub nom. Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, [sic] 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982). A dismissal on grounds of *forum non conveniens* by either court in this case would satisfy the majority's concern with avoiding hardship to the parties, without harming the interests of international comity.[9] The district court is not in a position, however, to make the *forum non conveniens* determination on behalf of the Japanese court. In light of the important interests of

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[9] On the issue of forum non conveniens, I note that this case involves a dispute between an American company and a Japanese company over an exclusive distributorship agreement covering the Japanese shoe market. Many of the third-party witnesses are located in Japan. Moreover, the district court found that Japan would be "an adequate forum" for both parties, and rejected Kaepa's argument that a Japanese court would not treat Kaepa with the same impartiality that would be shown to Achilles in an American court.

international comity, the decision by a United States court to deprive a foreign court of jurisdiction must be supported by far weightier factors than would otherwise justify that court's decision to decline its own jurisdiction on *forum non conveniens* grounds.

C

Accordingly, I believe that the standard followed by the Second, Sixth, and D.C. Circuits more satisfactorily respects the principle of concurrent jurisdiction and safeguards the important interests of international comity. Under this stricter standard, a district court should look to only two factors in determining whether to issue an antisuit injunction: (1) whether the foreign action threatens the jurisdiction of the district court; and (2) whether the foreign action was an attempt to evade important public policies of the district court.[10] *Gau Shan*

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[10] I note that we are required to apply a similarly strict standard in tolerance of concurrent state court proceedings. *See* 28 U.S.C. § 2283 ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where *necessary in aid of its jurisdiction*, or to *protect or effectuate its judgments.*") (emphasis added). Section 2283 "does not allow a federal court to enjoin state proceedings to protect a judgment that the federal court may make in the future but has not yet made." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 929 n. 59 (D.C.Cir.1984) (internal quotation marks omitted). In addition, FED.R.CIV.P. 13(a) had been held inapplicable in this context, and accordingly, "a federal court is barred by § 2283 from enjoining a party from proceeding in state court on a claim that should have been pleaded as a compulsory counterclaim in a prior federal suit." *Seattle Totems Hockey Club v. National*

Co., 956 F.2d at 1355; *China Trade*, 837 F.2d at 36; *Laker Airways*, 731 F.2d at 927. Neither of these factors are present in this case.

"Courts have a duty to protect their legitimately conferred jurisdiction to the extent necessary to provide full justice to litigants." *Laker Airways*, 731 F.2d at 927. Where the concurrent proceeding effectively threatens to paralyze the jurisdiction of the court, or where the foreign court is attempting to carve out exclusive jurisdiction over the action, an antisuit injunction may legitimately be necessary to protect the court's jurisdiction. In those rare cases where the foreign action is interdictory rather than parallel, the issuance of an antisuit injunction is primarily a defensive action not inconsistent with the principles of international comity. The court in *Laker Airways* affirmed the issuance of an antisuit injunction where the foreign action "was instituted by the foreign defendants for the sole purpose of terminating the United States claim." *Id.* at 915. In fact, the British Court of Appeals had enjoined the plaintiff from pursuing its claims against British defendants in a United States court under United States law. *Id.* Significantly, the United States district court in *Laker Airways* also made clear that its injunction was intended solely to protect its jurisdiction by preventing the defendants from taking any action before a foreign court or governmental authority that would interfere with the litigation pending before the district court. *Id.* at 919. The injunction was not intended

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Hockey League, 652 F.2d 852, 855 n. 5 (9th Cir.1981). This rule of restraint and respect regarding state court proceeding should apply with even greater force in the context of foreign tribunals.

to prevent all concurrent proceedings in foreign courts, only those which directly threatened the district court's jurisdiction. There is no evidence in this case that Achilles' action in Japan in any way threatens the district court's exercise of its concurrent jurisdiction. While the Japanese action may eventually proceed to a judgment which can be pled as *res judicata* in the district court, no attempt has been made to carve out exclusive jurisdiction on behalf of the foreign tribunal.[11]

As an example of where a court may need to act in order to protect its jurisdiction, a long-standing exception to the rule tolerating concurrent jurisdiction has been recognized for proceedings *in rem* or *quasi in rem*. *China Trade*, 837 F.2d at 36.[12] Because the second action may pose an inherent threat to the court's basis for jurisdiction, ar antisuit injunction may be appropriate in an *in rem* or *quasi in rem proceeding*. *Id.* "Where jurisdiction is based on the presence of property within the court's jurisdictional boundaries, a concurrent proceeding in a foreign jurisdiction poses the danger that the foreign court will order the transfer of the property out of the jurisdictional boundaries of the first court, thus depriving it of jurisdiction over the matter. This concern of course is

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[11] *See Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1354 (6th Cir.1992) (concluding that the possibility that a foreign ruling might result in the voluntary dismissal of the suit was merely a threat to the plaintiff's interest in prosecuting its suit, and was not a threat to the jurisdiction of the United States court).

[12] *See also Donovan*, 377 U.S. at 412, 84 S.Ct. at 1582 (citing *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 59 S.Ct. 275, 83 L.Ed. 285 (1939)).

not present in this *in personam* proceeding." *Gau Shan Co.*, 956 F.2d at 1358. Likewise, this concern is not present in the current *in personam* proceeding, the focus of which is a distribution agreement. I note that *In re Unterweser Reederei, Gmbh*, relied on by the majority, was an *in rem* proceeding, justifying the more permissive standard applied to the issuance of an antisuit injunction in that case.[13]

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[13] The other Fifth Circuit precedent relied on by the majority is equally distinguishable and does not control the outcome in this case. *See Bethell v. Peace*, 441 F.2d 495 (5th Cir.1971). The panel in *Bethell* reviewed an antisuit injunction that was issued only after *a judgment* had been entered upon a motion for summary judgment. 441 F.2d at 496. In affirming the issuance of the injunction, the Fifth Circuit panel also relied on the "power of a court of equity of one state to restrain *its own citizens* from prosecuting actions in a sister state when such actions serve to vex, harass, or oppress an opponent." *Id.* at 498 (emphasis added). The panel did not discuss the interests of international comity.

The majority purports not to be persuaded by the distinctions I identify in *Bethell* and *Unterweser*. They are, however, distinctions that make all the difference under the appropriate standard for evaluating antisuit injunctions. The issuance of an antisuit injunction *after judgment* or in an *in rem* proceeding falls under a well-recognized exception to the otherwise strict standard articulated by the Second, Sixth and D.C. Circuits. *See China Trade*, 837 F.2d at 36 (recognizing long-standing exception to usual rule tolerating concurrent proceedings for proceeding *in rem* or *quasi in rem*); *Laker Airways*, 731 F.2d at 928 (concluding that "a court may freely protect the integrity of its judgments by preventing their evasion through vexatious or oppressive relitigation," and citing *Bethell* for this proposition). Given the procedural posture in *Bethell* and *Unterweser*, the permissive "standard" applied in these cases is entirely consistent with the strict standard I am

Under the second factor of the stricter standard, an antisuit injunction may also be appropriate where a party seeks to evade important policies of the forum by bringing suit in a foreign court. *Gau Shan Co.* 956 F.2d at 1357. "While an injunction may be appropriate when a party attempts to evade compliance with a statute of the forum that effectuates important public policies, an injunction is not appropriate merely to prevent a party from seeking 'slight advantages in the substantive or procedural law to be applied in a foreign court.' " *China Trade*, 837 F.2d at 37 (quoting *Laker Airways*, 731 F.2d at 931, n. 73).[14] The policy favoring the resolution in a single lawsuit of all disputes arising out of a common matter does not, as noted earlier, outweigh the important interests of international comity. Rather, the principle enunciated under the second factor is "similar to the rule that a foreign judgment not entitled to full faith and credit under the Constitution will not be enforced within the United States when contrary to the crucial public policies of the forum in which enforcement is requested." *Laker Airways*, 731 F.2d at 931. Under this principle, a court is not required to give effect to a judgment that does violence to the forum's own fundamental interests. *Id.* Since the issuance

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proposing today. Therefore, contrary to what the majority asserts, adopting the strict standard for evaluating the issuance of antisuit injunctions in the Fifth Circuit would not require us to overrule any prior decision by this Court.

[14] *See also Laker Airways*, 731 F.2d at 931 n. 73 ("An impermissible evasion is much more likely to be found when the party attempts to elude compliance with a statute of specific applicability upon which the party seeking an injunction may have relied and which is designed to effectuate important state policies.").

of an antisuit injunction is a much greater and more direct interference with a foreign country's judicial process than is the refusal to enforce a judgment, it follows that an antisuit injunction should only be issued in the most extreme circumstances. Although the majority questions the purity of Achilles' motives in filing suit in Japan, there is no evidence that Achilles is attempting to evade any important policy of the United States forum.

II

Because neither factor supports the issuance of an antisuit injunction in this case, I believe the district court abused its discretion by enjoining Achilles from prosecuting an action filed in Japan. Accordingly, I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

KAEPA, INC.,	)	
	)	
Plaintiff,	)	CIVIL ACTION
VS.	)	NO. SA-94-CA-0627
ACHILLES CORPORATION,	)	
	)	
Defendant.	)	

ORDER DENYING MOTION TO DISMISS ON *FORUM NON CONVENIENS* AND GRANTING EMERGENCY MOTION TO ENJOIN

(Filed Apr. 17, 1995)

On this date the Court considered the Defendant's Motion to Dismiss on Ground of *Forum Non Conveniens*, filed March 9, 1995; the Plaintiff's Emergency Motion to Enjoin Achilles' Attempts to Prosecute Its Compulsory Counterclaim in Tokyo, Japan and for Sanctions, filed March 8, 1995; and the various responses, replies and affidavits of the parties related to said motions. After careful review of the evidence and arguments of the parties, the Court finds that the Motion to Dismiss should be denied and the Motion to Enjoin should be granted as set forth below.

This case arises out of a contract dispute between Plaintiff Kaepa, Inc., an American corporation, and Defendant Achilles Corporation, a Japanese company. Kaepa alleges breach of an exclusive distributorship agreement by Achilles and fraud and negligent misrepresentation by Achilles that induced Kaepa to enter into the

agreement. Approximately five months after Kaepa's action was removed from state court to this Court, Achilles filed suit against Kaepa in the District Court of Tokyo, Japan. Achilles' petition in the Japanese court alleges breach of contract by Kaepa as well as fraud that induced Achilles to enter into the agreement. Discovery in the cause before this Court has been ongoing. According to the calculations of the parties, written discovery has resulted in the production of approximately 20,000 documents. The Court previously ordered the parties to meet in Los Angeles where several key depositions were taken. The parties have also engaged, unsuccessfully to this point, in court ordered mediation.

Achilles now asks the Court to dismiss Kaepa's suit on the grounds of *forum non conveniens*. Kaepa, on the other hand, asks the Court to enjoin Achilles from prosecuting what Kaepa characterizes as a compulsory counterclaim in Japan. Since dismissal on forum non conveniens would render the motion to enjoin moot, the Court will first address the motion to dismiss and then discuss the motion to enjoin.

The parties initially disagree on whether the language of the distributorship agreement controls the choice of forum. Section 17 of the agreement states:

> APPLICABLE LAW LANGUAGE
>
> This Agreement shall be governed by the laws of the State of Texas, U.S.A., and shall be enforceable in San Antonio, Texas. The English version of this Agreement and the English language shall govern the interpretation and meanings of all words and phrases used herein.

> Distributor consents to jurisdiction in the State of Texas, U.S.A.

Kaepa contends that this choice of forum provision is mandatory and prohibits the Court from dismissing on *forum non conveniens* grounds unless the provision is affected by fraud, overreaching, undue influence or unequal bargaining power. The Court disagrees. The forum selection clause is mandatory only with reference to (1) the choice of United States law as controlling the interpretation of the document and (2) the choice of the English translation as the correct version of the contract and English as the agreed language for construing the contract. The provision is permissive with respect to where a lawsuit may be filed.

The contract provision states that the agreement "shall be enforceable" in San Antonio, Texas. The provision does not say that San Antonio, Texas is the only place where the agreement is enforceable. The agreement also states that Achilles "consents to jurisdiction" in San Antonio, Texas. Again, this language only means that if Kaepa brings suit against Achilles in this forum, Achilles consents to jurisdiction. (As Achilles is a Japanese company, without this consent, Kaepa might or might not be able to show personal jurisdiction over Achilles in the Texas courts.)

Unlike a mandatory forum selection clause, the provision before the Court does not indicate mandatory and exclusive jurisdiction in Texas. *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 77 (9th Cir. 1987). To borrow from the Ninth Circuit, "[a]lthough the word 'shall' is a mandatory term, here it means nothing more than that

the [San Antonio] courts have jurisdiction." *Id.* The parties could easily have made the forum selection mandatory by indicating that the agreement shall be enforceable "exclusively" in San Antonio or "only" in San Antonio. *See, e.g., M/S Bremen v. Zapata Off-Shore Co.*, 47 U.S. 1, 2, 92 S.Ct. 1907, 1909 (1972) (any dispute arising 'must be treated before the London Court'); *Pelleport Investors, Inc. v. Budco Qualities Theatre, Inc.*, 741 F.2d 273, 275 (9th Cir. 1984) (. . . shall be litigated only in . . .); *Taylor v. Titan Midwest Const. Corp.*, 474 F.Supp. 145, 148 (N.D.Tex. 1979) ('shall be . . . in the [specified] county' is mandatory language). The forum selection provision is not ambiguous and indicates the parties' agreement that the contract shall be enforceable in Texas as well as any other appropriate forum.

Because the Court finds that the forum selection clause adopted by the parties is permissive, normal *forum non conveniens* analysis is applicable. *Blanco v. Blanco Indus. de Venezuela, S.A.*, 997 F.2d 974, 979 (2nd Cir. 1993). The Court is required to determine whether Japan is an adequate forum for this dispute and to balance all relevant public and private interest factors involved in deferring to that forum. *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 835 (5th Cir. 1993). The Plaintiff's choice of forum is entitled to considerable deference but the Court may decline to exercise its jurisdiction when "it appears that the convenience of the parties and the court and the interests of justice indicate that the action should be tried in another forum." *Id.* at 828, *citing In Re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1155 (5th Cir. 1087), *aff'd in part, vacated in part*, 490 U.S. 1032, 109 S.Ct. 1928, 104 L.Ed.2d 400 (1989).

A *forum non conveniens* analysis is a three step process. *Baumgart,* 981 F.2d at 835. First, the Court must decide whether there is another forum available to the litigants which would provide an adequate remedy to the prevailing party. *Id.* "A foreign forum is available when the entire case and all parties can come within the jurisdiction of that forum." *Id.; In re Air Crash Disaster,* 821 F.2d at 1165. "A foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits as they might receive in an American court." *Baumgart,* 981 F.2d at 835.

Achilles urges the Court to defer to the district court of Tokyo, Japan. Kaepa has not argued that it is not subject to the jurisdiction of that forum or that there are other potential parties to the dispute who cannot be brought into the litigation in Japan, therefore, the forum is available to all parties. However, Kaepa asserts that Japan is not an adequate forum for the resolution of this dispute. Kaepa makes a vague allegation that the Japanese court cannot be impartial and submits the affidavit of Frank Legacki, President of Kaepa, to show that the main office of Fuji Bank is in Japan and Fuji Bank is a shareholder and major lender to Achilles. Even if the loan made to Kaepa by Fuji Bank is a major issue in the case, this Court will not assume that the Japanese court will not treat Kaepa with the same impartiality that would be shown to Achilles in an American court. Kaepa's counsel states that he understands there is no pretrial discovery in Japan and complains that Kaepa cannot obtain a trial

by jury.[1] Counsel for Achilles, Shigeo Ohshima, states in his affidavit that discovery procedures in Japan, while not identical to those in the United States, will be adequate.

The Court finds that Japan would present an adequate forum for the pending litigation. Similar complaints regarding the adequacy of the Japanese courts have previously been presented to the Ninth Circuit in *Lockman Foundation v. Evangelical Alliance Mission*, 930 F.2d 764 (9th Cir. 1991). The Ninth Circuit found that the lack of jury trial does not render the Japanese courts an inadequate forum. *Id.* at 768, *citing In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195, 199, 202 (2nd Cir.), *cert. denied*, 484 U.S. 871, 108 S.Ct. 199, 98 L.Ed.2d 150 (1987). The court in Lockman was also persuaded by expert testimony that discovery procedures in Japan would be adequate. *Id.* Here, Kaepa merely says it understands there is no discovery available in Japan while Achilles makes the conclusory statement that discovery would be different but adequate. Slight as it is, the Court is inclined to accept Achilles' evidence that differences in discovery procedure do not render Japan an inadequate forum. *See id.* at 769 n. 3.

Having determined that Japan would be an adequate forum for these parties, the Court must consider whether private interest factors argue against retaining jurisdiction in the United States. These factors include "(1) the

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[1] These arguments are made with regard to Kaepa's Motion to Enjoin, however, the points are pertinent to the discussion of the Motion to Dismiss.

relative ease of access to sources of proof; (2) the availability of compulsory process for attendance of unwilling, and the costs of obtaining attendance of unwilling, witnesses; (3) probability of an opportunity to view the premises, if view would be appropriate to the action;[2] and (4) other factors affecting the ease, speed, and expense of trial or the enforceability of a judgment obtained. *Baumgart*, 981 F.2d at 836.

In the case at bar, the sources of proof appear to be equally distributed between this forum and Japan. Achilles' documents pertaining to the negotiation of the agreement are in Japan while Kaepa's documents are in the United States. Documents relating to Kaepa's financial background and the Fuji Bank loan are in the United States. Achilles argues that documentation of conduct by Kaepa's former distributor and Kaepa's performance in Japanese markets, as this relates to Achilles' defense, is in Japan. It also appears that the majority of Achilles' documentary evidence is in Japanese and Kaepa's is in English. The same problem arises with respect to witnesses. Achilles' party witnesses are in Japan and speak Japanese. Kaepa's party witnesses are primarily in the United States and speak English. Neither forum would obviate the need for extensive translation from Japanese to English or vice versa. Either forum requires one party or the other to bring crucial employee witnesses overseas to testify. Finally, it appears that there may be some third party witnesses in each forum who will not be amenable to compulsory process, therefore, there will be unavoidable inconvenience regardless of the ultimate forum.

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[2] This is not a factor in this case.

Other factors related to the ease, speed, and expense of trial and the enforceability of judgment are either balanced or slightly weighted against dismissal. Kaepa's counsel testifies in his affidavit that a determination by a Japanese court could take two to three years.[3] This estimate is not disputed by Achilles. Barring unusual circumstances, this case is set for trial by this Court in January of 1996. However, if we assume that final determination would require the same time as estimated for the Japanese court, it becomes significant that the present case has been pending before this Court for nine months, during which time the parties have accomplished much in the way of discovery. As to enforceability, a judgment rendered in either forum would seem to be equally enforceable. Achilles has agreed to the jurisdiction of the United States courts and Kaepa is apparently amenable to jurisdiction in Japan.

Because the private interest factors do not weigh in favor of dismissal, the Court must undertake to examine the relevant public factors. These include (1) administrative difficulties flowing from court congestion; (2) the local interest in having localized controversies resolved at home; (3) the interest of having a diversity case tried in a forum that is familiar with the law that must govern the action; (4) the avoidance of unnecessary problems in conflicts of law or in the application of foreign law; and (5) the unfairness of burdening citizens in an unrelated forum with jury duty. *Baumgart*, 981 F.2d at 837. After

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[3] See affidavit of Seagal Wheatley attached to Kaepa's Emergency Motion to Enjoin.

careful consideration, the Court finds that the public interest factors do not mandate dismissal.

Court congestion does not present a problem in retaining the suit on this Court's docket. In fact, from the evidence presented, it appears that this is more of a concern for the Japanese court. Achilles strongly argues that because the agreement was to be wholly performed in Japan, Japan has a stronger interest in the subject matter. However, this interest alone is not sufficient to require deference to the Japanese forum. In this particular case, facts related to the choice of law and the relationship of the parties weigh heavily against dismissal. The parties have agreed in clear contract language that the English language version of the distributorship agreement will be the translation used to resolve contract disputes and that the law of the the [sic] State of Texas and the English language would govern the interpretation of the contract.[4] To litigate contract provisions in Japan, the document would have to be translated into Japanese and then the Japanese court would have to apply American law and the principles of the English language to interpret an English language document. While this task is not impossible, it seems absurd to ask our Japanese counterpart to undertake such gyrations when this Court provides a suitable forum for the parties. Although Achilles contends that Japanese law would control the tort claims involved in the case, neither party has indicated that Japanese law is different from Texas law in

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[4] There are contract interpretation issues raised by both parties, i.e., whether the sales amounts in the contract are requirements or merely target figures.

this context. Absent such a showing, the Court is entitled to presume that there is no conflict of law issue on the tort claims. *Bethel v. Peace,* 441 F.2d 495, 497 (5th Cir. 1971).

Finally, the Court notes that Achilles is a sophisticated, billion dollar company with extensive interests in the United States. Achilles was intimately involved with the negotiation and drafting of the distributorship agreement and knew when it consented to jurisdiction in the Texas courts that any problem related to the contract might be litigated in the United States even though the contract itself was performed entirely in Japan. Combined with the Court's determination that a balancing of the factors tends toward retaining jurisdiction, the relationship of the parties and the circumstances of this dispute call for deference to Kaepa's choice of forum in this Court.

Because the case will not be dismissed on *forum non conveniens* grounds, the Court must address Kaepa's motion to enjoin Achilles from pursuing its suit in Japan. It is undisputed that a federal district court has the power to enjoin a party properly before the court from prosecuting a parallel action in a foreign jurisdiction. *Seattle Totems Hockey Club, Inc. v. National Hockey League,* 652 F.2d 852, 855 (9th Cir. 1981). For reasons of comity, Achilles urges the Court to use the strict standard adopted by certain circuits which would only allow injunction where (1) the foreign action threatens the jurisdiction of the enjoining forum or (2) strong public policies of the enjoining forum are threatened by the foreign action. *See, e.g., China Trade & Devel. Corp. v. M.V. Choong Yong,* 837 F.2d 33, 36 (2nd Cir. 1987); *Laker Airways v. Sabena,* 731 F.2d

909, 927 (D.C.Cir. 1984); *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1353-54 (6th Cir. 1992). However, the Fifth Circuit and others have allowed injunction where the foreign litigation would "(1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing court's in rem or quasi in rem jurisdiction; or (4) where the proceedings prejudice other eqitable [sic] considerations." *Seattle Totem*, 652 F.2d at 855, *citing In re Unterweser Reederei Gmbh*, 428 F.2d 888, 896 (5th Cir. 1970), *aff'd on rehearing en banc*, 446 F.2d 907 (1971), *rev'd on other grounds sub nom., Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S. Ct. 1907, 32 L.Ed.2d 513 (1972). This Court is guided by the pronouncement of the Fifth Circuit in *In re Unterweser Reederei Gmbh*:

> . . . allowing simultaneous prosecution of the same action in a foreign forum thousands of miles away would result in 'inequitable hardship' and 'tend to frustrate and delay the speedy and efficient determination of the cause.'

Id. at 896. *See also Allendale Mut. Ins. v. Bull Data Systems*, 10 F.3d 425, 430-31 (7th Cir. 1993) (parallel lawsuits proceeding in two tribunals 4,000 miles apart at the same time is absurd duplication of effort).

The Court agrees with Kaepa's characterization of Achilles' Japanese action as a compulsory counterclaim. The parties are identical and the facts all arise out of the same set of transactions, the negotiation and subsequent performance of the distributorship agreement. Both Achilles and Kaepa plead fraud and misrepresentation in the inducement of the contract, and both plead failure of performance by the opposing party. These claims are so irrevocably intertwined that each is a defense to the

other. Separate adjudications may result not only in unnecessary expense and inconvenience but also in inconsistent rulings or a race to judgment. *Seattle Totems*, 652 F.2d at 856. This is exactly the type of duplicative litigation that Rule 13 of the Federal Rules of Civil Procedure is designed to prevent. *Id.* The Seventh Circuit notes, "[t]his increasingly is one world and we have difficulty seeing why the usual and by no means stringent rules for limiting duplicative litigation should stop at international boundaries." *Philips Medical Sys. Internat'l B.V. v. Bruetman*, 8 F.3d 600, 605 (7th Cir. 1993). This Court finds that Achilles should be enjoined from pursuing its action in the district court of Tokyo, Japan.

Kaepa has also asked for sanctions in the form of attorneys fees for the preparation of its emergency motion to enjoin prosecution of the Japanese action. Although the necessity for such an action was undoubtedly vexatious and inconvenient to Kaepa, the state of the law regarding parallel lawsuits in foreign jurisdictions is not so settled that Achilles' conduct can be considered frivilous or unwarranted as a matter of law. The Court finds that sanctions are not appropriate at this time.

Accordingly, it is hereby ORDERED that the Defendant's Motion to Dismiss on Grounds of *Forum Non Conveniens* is DENIED.

It is further ORDERED that Kaepa's Emergency Motion to Enjoin Achilles' Attempts to Prosecute Its Compulsory Counterclaim in Tokyo, Japan is GRANTED, except that the motion for sanctions is DENIED.

In accordance with the Court's ruling above, Achilles is further ORDERED as follows:

(1) Achilles, its agents, servants, employees, and attorneys, and all persons in active concert and participation with it, are restrained from taking any further action in the prosecution or litigation of Case No. 1994 (Wa) 20606 pending in the Civil Affairs Division 13 of the Tokyo District Court ("Tokyo Suit") or in instituting an action in any other court against Plaintiff Kaepa involving subject matter or issues common to or overlapping with this suit;

(2) Achilles shall advise the Tokyo District Court in writing that Achilles, its agents, employees, and all other persons, firms or corporations acting or claiming to act in Achilles' behalf, or in concert or participation with Achilles, are enjoined from further prosecuting the Tokyo Suit, and enjoined from taking any action therein until further orders of this Court. Achilles shall give the Tokyo District Court a copy in writing of this Court's Order by 5:00 p.m. (Tokyo time) on or before April 18, 1995;

(3) Achilles shall request a stay of the Tokyo Suit on or before April 18, 1995, so that Kaepa, Inc., shall not be required to answer or defend the Tokyo Suit:

(4) Achilles shall file with the Clerk of this Court a document certifying that such actions described in this Order have been filed with the Tokyo District Court, and further stating the date of the filing with the Tokyo District Court, on or before April 24, 1995, and such filing shall be copied to all counsel of record; and

(4) [sic] Achilles shall file any counterclaims it may have with this Court on or before April 28, 1995.

IT IS SO ORDERED.

SIGNED and ENTERED this 14th day of April 1995.

/s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

KAEPA, INC.,	)	
	)	
Plaintiff,	)	CIVIL ACTION
VS.	)	NO. SA-94-CA-0627
ACHILLES CORPORATION,	)	
	)	
Defendant.	)	

AMENDED ORDER DENYING MOTION TO DISMISS ON *FORUM NON CONVENIENS* AND GRANTING EMERGENCY MOTION TO ENJOIN

(Filed Apr. 20, 1995)

On this date the Court considered the status of the above styled and numbered cause. It has come to the Court's attention that the parties may not receive notice of the Court's Order Denying Motion to Dismiss on *Forum Non Conveniens* and Granting Emergency Motion to Enjoin in time for Defendant to comply with the deadlines set out in that Order.

It is therefore ORDERED the deadlines prescribed for action by Defendant Achilles Corporation in the above described Order are hereby amended as follows:

(2) Achilles shall advise the Tokyo District Court in writing that Achilles, its agents, employees, and all other persons, firms or corporations acting or claiming to act in Achilles' behalf, or in concert or participation with Achilles, are enjoined from further prosecuting the Tokyo Suit, and enjoined from taking any action therein until further orders of this Court. Achilles shall give the Tokyo

District Court a copy in writing of this Court's Order by 5:00 p.m. (Tokyo time) on or before **April 24, 1995**;

(3) Achilles shall request a stay of the Tokyo Suit on or before **April 24, 1995**, so that Kaepa, Inc., shall not be required to answer or defend the Tokyo Suit.

All other deadlines remain in place.

IT IS SO ORDERED.

SIGNED and ENTERED this 19th day of April 1995.

/s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50278

KAEPA, INC.

Plaintiff - Appellee

v.

ACHILLES CORPORATION

Defendant - Appellant

Appeal from the United States District Court for the Western District of Texas, San Antonio

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion February 14, 1996, 5 Cir., F.3d)

(Filed March 18, 1996)

Before WIENER, EMILIO M. GARZA, BENAVIDES, Circuit Judges.

PER CURIAM:

(✓) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jacques L. Wiener, Jr.
United States Circuit Judge